

Attorneys for Browning-Ferris Industries of California, Inc.

BEFORE THE NATIONAL LABOR RELATIONS BOARD

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OPPOSITION TO REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
STATEMENT OF FACTS.....	2
I. General Background	2
A. Corporate Structures and Business Purposes.....	2
B. Operational Structure at BFI's Recyclery Operations	3
II. The Contractual Relationship	5
III. The Regional Director Considered All of The Record Evidence, Which Establishes That Leadpoint Is Responsible For All Labor Matters Regarding The Workers	8
A. BFI Does Not Supervise The Leadpoint Workers	8
B. BFI Does Not Direct The Leadpoint Workers On A Daily Basis	12
C. BFI Does Not Control The Leadpoint Workers' Wages	17
D. BFI Does Not Control The Hiring Criteria For The Leadpoint Workers.....	20
E. BFI Does Not Regularly Train The Leadpoint Workers.....	20
F. BFI Does Not Enforce Its Employment Workplace Rules Against The Leadpoint Workers.....	24
G. BFI Has No Involvement With Discipline For The Leadpoint Workers	26
H. BFI Does Not Schedule The Individual Leadpoint Workers	27
I. BFI Does Not Set Productivity Standards For The Leadpoint Workers.....	31
IV. The Acting Regional Director Appropriately Applied Existing Board Precedent.....	33
V. There is No Compelling Reason To Overturn Existing Board Precedent	40

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Airborne Freight Co.,</i> 338 NLRB 597 (2002)	37, 39, 40
<i>AM Property Holding Corp.,</i> 350 NLRB 998 (2007)	33
<i>Boire v. Greyhound Corp.,</i> 376 U.S. 473	39
<i>Cabot Corp.,</i> 223 NLRB 1388 (1976)	33
<i>G. Wes Ltd. Co.,</i> 309 NLRB 225 (1992)	12, 35
<i>Heileman Brewing Co.,</i> 290 NLRB 991 (1998)	35
<i>Hychem Constructors, Inc.,</i> 169 NLRB 274 (1968)	38, 39
<i>Laerco Transp. & Warehouse,</i> 269 NLRB 324 (1984)	36
<i>NLRB v. Browning-Ferris Indus.,</i> 691 F.2d 1117 (3d Cir. 1982)	33
<i>Quantum Res. Corp.,</i> 305 NLRB 759 (1991)	35
<i>S. Cal. Gas Co.,</i> 302 NLRB 446 (1991)	35, 37
<i>Thums Long Beach Co.,</i> 295 NLRB 101 (1989)	35
<i>TLI, Inc.,</i> 271 NLRB 798 (1984)	33, 35, 36, 39

Under the Board's Rules and Regulations § 102.67, Browning-Ferris Industries of California, Inc. ("BFI") respectfully opposes the Union's Request for Review in this matter because the Union has failed to establish any compelling reasons for review. In short, the Decision and Direction of Election of the Acting Regional Director of Region 32 ("DDE"): 1) does not contain any substantial factual issue that is clearly erroneous on the record and prejudicially affects the Union's rights; 2) does not depart from officially reported Board precedent; and 3) does not present any compelling reasons to overturn existing Board precedent, which the DDE appropriately followed. The Union's request should be denied.

STATEMENT OF THE CASE

On July 23, 2013, the International Brotherhood of Teamsters Local 350 ("the Union") filed a representation petition in Case No. 32-RC-109684 seeking certification as the collective bargaining representative of the following unit:

Included:

All full and part-time sorters, housekeepers and screen cleaners employed at the Employer's facility located at 1601 Dixon Landing Road, Milpitas, California.

Excluded:

Employees currently covered by collective bargaining agreements, clerical employees, supervisors and guards as defined under the Act.

The petition claims that Leadpoint Business Services, LLC ("Leadpoint") is a joint employer with BFI. Hearing Officer Paloma Loya conducted a hearing at the NLRB office in Oakland, California, on August 5, 2013. The sole issue at the hearing was

whether BFI is a joint employer with Leadpoint for the petitioned-for unit. BFI and Leadpoint both took the position that Leadpoint is the sole employer of the petitioned-for unit, while the Union took the position that BFI and Leadpoint are joint employers.

BFI presented testimony from four BFI supervisors: Division Manager Carl Mennie, Operations Manager Paul Keck, Dayshift Supervisor John Sutter and Swingshift Supervisor Augustine Ortiz. Leadpoint presented testimony from its CEO and President, Frank Ramirez, and Shift Supervisor and Interim On-Site Manager, Vincent Haas. The Union presented testimony from Housekeeper Clarence Harlin, Screen Cleaner Travis Stevens and Sorters Andrew Mendez and Marivel Mendoza.

In the August 16, 2013 DDE, the Acting Regional Director for Region 32 analyzed the facts and applicable law in detail and determined that “BFI and Leadpoint are not joint employers of the employees in question because BFI does not ‘share, or co-determine [with Leadpoint] those matters governing the essential terms and employment’ of Leadpoint’s housekeepers, sorters, or screen cleaners at BFI’s Facility.” (DDE, at 15 (alteration in original).)

STATEMENT OF FACTS

I. General Background

A. Corporate Structures and Business Purposes

BFI is a waste services company that provides recycling services at its material recovery facility and organic operation at the Newby Island Recyclery (“Recyclery”).

(Tr. 12-13.)¹ Republic Services, Inc. is a parent company of BFI. (Tr. 43.) Leadpoint has no corporate relationship with either BFI or Republic Services. (Tr. 43, 156.) Leadpoint is a staffing services agency that provides temporary labor to different companies. (Tr. 189; Jt. Ex. 1, § 1.)

B. Operational Structure at BFI's Recyclery Operations

The Recyclery is an 80,000 square-foot building that processes approximately 1,200 tons a day of mixed materials, mixed waste and mixed recyclables, which BFI later sells. (Tr. 13.) The Recyclery contains different physical areas, including a break room, a tip floor and a sort platform area. (Tr. 13.) Trucks bringing material into the Recyclery enter the facility in the tip floor area and drop the material there.² (Tr. 13-14.) Afterwards, the material moves through the sorting area on four different kinds of lines comprised of a series of conveyer belts, screens and motors. (Tr. 15-16.) Metering bins and a push wall physically separate the tip floor from the sorting area. (Tr. 13-14.) The Recyclery has designated lines for residential mixed recyclables, commercial mixed recyclables, dry waste product and wet waste product in the sorting area. (Tr. 16.)

BFI has five supervisors on site: Division Manager Carl Mennie, Operations Manager Paul Keck, Dayshift Supervisor John Sutter, Swingshift Supervisor Augustine

¹ References to the Joint Exhibits are designated as (Jt. Ex. ____). References to Leadpoint and Union Exhibits are designated (LP. Ex. ____) and (U. Ex. ____), respectively. References are designated (Tr. ____).

² The drivers of those trucks include both BFI employees from another division and contract workers, neither of whom is at issue in this matter. (Tr. 13-14.)

Ortiz and Shipping Supervisor Phil Carroll.³ (Tr. 12, 17.) Messrs. Sutter, Ortiz and Carroll report directly to Mr. Keck, who reports to Mr. Mennie. (Tr. 34-35.) BFI's management team supervises approximately 60 BFI employees at the Recyclery, including loader operators, equipment operators, forklift operators, mechanics, sort line equipment operators, baler operators and spotters, who typically work in the tip floor area and the exterior portions of the facility. (Tr. 14-15, 17-18, 32, 93, 123.)

BFI contracts with Leadpoint for contract workers to sort the material coming into the facility ("Sorters") and clean the screens on the sorting equipment in the sorting area when they get jammed or cluttered with material ("Screen Cleaners"). (Tr. 16-17, 186.) A few Leadpoint workers also clean the facility ("Housekeepers"). (Tr. 185-86.) BFI has contracted with Leadpoint for work since 2009 and previously contracted with other staffing agencies to perform the same work. (Tr. 17, 123-24.) BFI has never employed a group of BFI employees to perform those duties.⁴ (Tr. 17, 123-24.) Nor do BFI employees typically work side-by-side with the Leadpoint workers. (Tr. 30-31.) The only commonly-shared areas are the parking lot, break room and bathroom. (Tr. 52.)

BFI has no responsibility to supervise the Leadpoint workers, who have their own onsite management; rather, BFI supervisors have their own employees to supervise in

³ Mr. Carroll was on leave at the time of the hearing and the Union did not present any evidence regarding Mr. Carroll – let alone evidence that he has material control over the terms and conditions of employment for Leadpoint workers (which he does not).

⁴ While BFI does have one employee who performs sorter duties, she was given those duties years ago after her position was eliminated due to the loss of a large municipal contract. (Tr. 124-26.) She is grandfathered into BFI's existing contract with the Union, which otherwise exempts out sorters from that collective bargaining unit, and receives different pay under that CBA than Leadpoint provides its workers. (Tr. 124-26, 152-53.)

other areas of the Recyclery. (Tr. 17-18, 73, 93, 123.) While BFI has only five total supervisors at the Recyclery (with just one supervisor for some shifts), Leadpoint has a much larger management staff with fourteen total supervisors on site (with anywhere from two to seven supervisors on site for any given shift), including one On-Site Manager (Vincent Haas is currently filling in as the Interim On-Site Manager), three Shift Supervisors (Albert Pena, Vincent Haas and Arturo Morier), seven Line Leads (Johnny Mosley, Jorge Noegua, Miguel Delarosa, Richard Picho, Herman Martinez, Benjamin Torres and Antonio Escavido) that report to their respective shift supervisor, two Housekeeping Leads (Patrick Baker, Michael Ramirez) and one Organics Lead (Jose Medina).⁵ (Tr. 157, 189-192.) Leadpoint also has an HR Generalist, Anthony Chavez, and an Administrative Assistant at the Recyclery to address Leadpoint workers' day-to-day labor relations needs. (Tr. 23, 158.) Mr. Chavez and his assistant work out of a trailer bearing the Leadpoint logo. (Tr. 158-59.) BFI does not have any supervisors or employees who work out of that trailer. (Tr. 159.) Frank Ramirez, Leadpoint's CEO and President, also visits the Recyclery at least two to three times each quarter to observe the Leadpoint workers and makes himself available to discuss any issues that they may have. (Tr. 156, 173-75.)

II. The Contractual Relationship

In October 2009, Leadpoint entered into a Temporary Labor Services Agreement ("Agreement") with Allied Waste North America, Inc., a parent company of BFI, to

⁵ Prior to the hearing, Leadpoint and the Union stipulated that the Leads are 2(11) supervisors of Leadpoint. (Tr. 7.)

provide workers to perform sorting and related cleaning tasks at the Recyclery. As the Agreement expressly states:

Agency is the **sole employer** of the Personnel supplied by Agency pursuant to the terms of this Agreement. Nothing contained in this Agreement shall be construed as creating an employment relationship between Client, any direct or indirect subsidiary of Client, or any Division of Client or any subsidiary, on the one hand, and any of Agency's Personnel, on the other hand.⁶

(Jt. Ex. 1, § 4 (emphasis added).)

The Agreement contractually requires Leadpoint to:

- “[R]ecruit, interview, test, select, hire, and train the Personnel” (Jt. Ex. 1, § 4);
- “[E]nsure that its Personnel have the appropriate qualifications (including certification and training), consistent with applicable laws and instructions from Client, to perform the general duties of the assigned position” (Jt. Ex. 1, § 4);
- “[B]e solely responsible for completing documents required by federal and state law for purposes of verifying that all Personnel are legally authorized to work in the United States” (Jt. Ex. 1, § 4);
- “[E]nsure that its Personnel are able to perform the essential functions of the duties required by Client, with or without reasonable accommodations” (Jt. Ex. 1, § 4);
- Conduct a five-panel urinalysis drug screen and verify each Personnel's social security number as required by law, including bearing all costs for such tests and verification (Jt. Ex. 1, § 4);
- “[V]erif[y] each Personnel's social security number with the Social Security Administration as required by law” (Jt. Ex. 1, § 4);
- “[O]btain from Personnel referred to Client a written acknowledgement that they understand they are obligated to perform services for Client free from the effects of alcohol and illegal drug use” (Jt. Ex. 1, § 4);

⁶ As used in the Agreement, “Agency” is Leadpoint and “Client” is BFI. (Tr. 44-45.)

- “[E]nsure, in a manner consistent with applicable law, that all Personnel placed with Client . . . report for and remain at work free from the effects of alcohol and illegal drug use and in condition to perform assigned duties” (Jt. Ex. 1, § 4);
- “[M]aintain all necessary payroll and personnel records” (Jt. Ex. 1, § 4);
- Retain “sole responsibility to counsel discipline, review, evaluate, determine pay rates, and terminate the Personnel assigned pursuant to this Agreement” (Jt. Ex. 1, § 4);
- “[R]equire its Personnel to wear all personal protective equipment,” as necessary for the services provided under the Agreement, at Leadpoint’s own expense (Jt. Ex. 1, § 5); and
- Maintain workers’ compensation insurance, employer’s liability insurance and certain other insurance coverage related to its workers (Jt. Ex. 1, § 9).

In regards to Leadpoint workers’ pay and benefits, the Agreement could not be clearer:

Agency is **fully and solely responsible** for all payments whatsoever required to be made to or with respect to Personnel including, without limitation, all wages and salaries (including overtime and any bonuses), all benefits (including health insurance, medical payments, life insurance, and/or retirement benefits), all federal, state and local payroll taxes, and all worker’s compensation insurance and unemployment coverage and payments. . . . Client shall have **no obligation** whatsoever to make any payment to or in respect of any Personnel. Rather, Client is **responsible solely** for paying Agency’s fees in accordance with Paragraph 3.

(Jt. Ex. 1, § 4 (emphases added).) BFI pays Leadpoint a bill rate mark up amount as a percentage of the wages that Leadpoint pays to its employees. (Jt. Ex. 1, at Ex. A.) However, the Agreement expressly states that Leadpoint “solely determines the pay rates paid to its Personnel.”⁷

⁷ While the Agreement provides that BFI will not pay fees for services based on Leadpoint wage rates in excess of the pay rate for BFI’s full-time employees performing similar duties, if any, that provision does not allow BFI to set wages rates for any

The Agreement does allow BFI to “reject any Personnel” and “discontinue the use of any Personnel for any or no reason.” (Jt. Ex. 1, § 7.) However, that language does not have any bearing on whether the worker remains employed by Leadpoint and BFI does not have the right to reject a Leadpoint worker from “employment.” (Tr. 182, 185.) Contrary to the Union’s claim, either party can terminate the Agreement by giving 30 days prior written notice. (Jt. Ex., § 2.)

III. The Regional Director Considered All Of The Record Evidence, Which Establishes That Leadpoint Is Responsible For All Labor Matters Regarding The Workers.

A. BFI Does Not Supervise The Leadpoint Workers.

The Union claims that BFI’s supervisors “constantly,” “extensively” and “daily” “monitor” and “assess” the Leadpoint workers. That misrepresentation finds no support in the record. Contrary to the Union’s claim that BFI supervisors spend a “large percentage” of their day “directly observing” the Leadpoint workers, the record evidence shows BFI’s supervisors spend almost no time interacting with or around the Leadpoint workers on a daily basis:

- Mr. Mennie spends only 5% of his day interacting with Leadpoint supervisors and 0% of his day interacting directly with Leadpoint workers. (Tr. 29.)

particular Leadpoint worker. (Tr. 9; Jt. Ex. 1, § 3.) Rather, it simply sets out the contractual limit that BFI agrees to assume as pass-through costs so that it does not pay a service fee for that labor in excess of what it would pay a BFI employee in wages, which would not make sense from a business perspective. As Mr. Mennie explained, that provision means that, “if they decided to pay a different rate we wouldn’t increase it for the service fee.” (Tr. 49.)

- Mr. Keck spends only 30% of his day in areas where the Leadpoint workers are present and does not converse directly with them on a daily basis. (Tr. 127-28.)
- Mr. Ortiz spends only 25% of his day walking through the sorting platform area and he does not speak directly with Leadpoint workers on a day-to-day basis. (Tr. 74-75, 80.) While Mr. Mendez testified that he frequently sees Mr. Ortiz walking around the Recyclery, that does not mean that he is monitoring, observing or interacting with the Leadpoint workers. Rather, Mr. Ortiz testified that he “more than likely” will direct Leadpoint workers to a Leadpoint supervisor if they have an issue and will usually address service issues with Leadpoint supervisors. (Tr. 81.)
- Mr. Sutter similarly spends only 15% of his day in areas where the Leadpoint workers are present and does not interact with them on a daily basis. (Tr. 97.) Mr. Sutter will similarly direct Leadpoint workers to Leadpoint management if they have a question, such as whether to perform a larger cleaning job, and will typically go to Leadpoint supervisors if Leadpoint workers need a tool. (Tr. 97, 101-02, 111-12.)

Even when BFI’s supervisors are in the same work areas as the Leadpoint workers, they do not typically speak directly with the Leadpoint workers – save for a handful of examples over four years, as detailed in the subsections below. Furthermore, while the Union claims that Equipment Operator David Martinez “monitors” the Leadpoint workers during their shift, the Union fails to cite to any record evidence on this point and, at any rate, Mr. Martinez is a non-supervisory BFI employee who is represented by the Union. (Tr. 117-18.)

Nor is there any evidence suggesting that BFI supervisors otherwise “monitor” or “assess” the Leadpoint workers “constantly” or “daily.” To support this allegation, the Union points to the fact that BFI supervisors and Leadpoint supervisors have walkie-talkies to communicate with each other. However, there is no record evidence that BFI

supervisors are in “constant” communications with the Leadpoint supervisors, let alone that they use the walkie-talkies to observe or maintain oversight of the Leadpoint workers’ performance of services. Rather, the testimony showed only that BFI supervisors use the walkie-talkies to inform Leadpoint supervisors how long the lines will be running. (Tr. 39, 274-75.) As Mr. Sutter explained: “the leads are told what time we’re going to run until, so they have an hour to manipulate whatever people they need to move to whatever line is going to run, and who’s going to go home; that’s all their decisions.” (Tr. 107-08.) Even the Union’s witnesses admitted that only Leadpoint supervisors instruct them on overtime – not BFI – and that they do not come to BFI with scheduling issues. (Tr. 227, 276.) To take that evidence and transform it into an argument that BFI uses the walkie-talkies “constantly” and “daily” to “monitor” and “assess” the Leadpoint workers has no basis in reality.

In truth, it is the Leadpoint supervisors who constantly work with, monitor and assess their workers. Unlike the BFI supervisors, who have a much smaller on-site staff and responsibilities outside of the areas where the Leadpoint workers perform services, the Leadpoint supervisors’ sole duties are to supervise, monitor and assess their workers on a daily basis. To document that they are performing those job duties, the Leadpoint supervisors must fill out daily Standard Work forms indicating they have performed the following tasks each shift:

- Sorters
 - Conduct daily safety tailgate meetings and lead team stretching;

- Review the sign-in sheet. Make sure all employees sign in and punch clock. Call back-ups if needed;
 - Issue PPE and document as required;
 - Assign employees to proper line and station to achieve target quality and productivity guidelines; review and retrain priority picks and re-assign sorters as required;
 - Monitor employees to ensure proper use of required PPE and compliance with safety guidelines at all times;
 - Conduct and document sorter hand speeds; review and coach employees based on results; submit results to On Site Manager;
 - Monitor sorter quality levels; report all equipment set-up concerns (screen angles, etc.) to system operator immediately; and
 - Review material pick requirements and re-train entire crew as required; monitor at least 3 times per day.
- Screen Cleaners and Housekeepers
 - Assign and direct employees to promptly clear jams per established safety and operational guidelines;
 - Ensure all affected employees are trained and in compliance with LOTO guidelines;
 - Ensure screen cleaners remove debris after clearing jams;
 - Complete [Leadpoint-created] screen cleaning logs; and
 - Lead and direct housekeeping activities for assigned areas; ensure all stairs and walkways are kept clean and clear.

(Tr. 206-07; LP Ex. 2A.) The Leadpoint supervisors are also responsible for their workers' time records, workers' compensation documents, first aid and accident reports, disciplinary actions, drug tests and on-boarding for new hires and productivity levels, as well as notifying Leadpoint HR if a worker changes shifts or positions. (LP Ex. 2A.)

Mr. Haas, as the Interim On-Site Manager, assists the Leadpoint supervisors in

completing their daily tasks and must confirm that the supervisors actually complete their Standard Work forms each day. (Tr. 193-97; LP Ex. 2B.)

B. BFI Does Not Direct The Leadpoint Workers On A Daily Basis.

While the Union stresses that Leadpoint workers perform services on BFI's equipment at stationary sorting stations established by BFI, the Union misunderstands the Regional Director's decision by claiming that evidence contradicts the finding that BFI does not decide where particular Leadpoint workers work along the line. Leadpoint typically assigns its workers to a particular station, as evidenced by the daily Standard Work forms that all Leadpoint supervisors must fill out: "Assign employees to proper line and station to achieve target quality and productivity guidelines; review and retrain priority picks and re-assign sorters as required." (LP Ex. 2A.) Further, while BFI supervisors have directed Leadpoint workers to change lines when one stops and another starts a "couple of times" over the years (Tr. 283), Board law cannot be more clear that instructing workers where to work and with whom does not establish a joint employer relationship. *See, e.g., G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992).

The Union's continued insistence that BFI controls the Leadpoint workers' assignments by setting the target headcount misses the point – Leadpoint alone assesses job applicants in terms of skills and, if hired, determines where its workers will perform services. (Tr. 18-20, 63, 73-74, 93-94, 126-27, 158-61, 177, 200-01.) For example, Mr. Stevens admitted that Leadpoint moved him into a Sorter and Screen Cleaner position when a Leadpoint supervisor told him, "Hey, we're going to train you on screen

cleaner.”⁸ (Tr. 244, 252, 292.) Mr. Harlin similarly admitted that he made the decision to change positions from a Sorter to a Housekeeper without any involvement by BFI. (Tr. 239.)

While BFI supervisors do meet with Leadpoint supervisors to go over which services needed to be provided each day, that does nothing to establish joint employer status. BFI, not Leadpoint, is in the recyclery business and is responsible for its operations. As Leadpoint’s customer, BFI should be able dictate what services it needs provided without creating a joint employer relationship. Otherwise, any time a customer explained a specific product or service that she wanted – such as contracting with a general contractor to build new kitchen cabinets of a certain material, color, shape and size – she would be considered a joint employer when the contractor tells its employee how to build the cabinets to the customer’s specifications. It is still the numerous Leadpoint supervisors who remain around the Leadpoint workers all shift and who instruct them what to do on a day-to-day basis. For example, if a line breaks, a BFI supervisor may coordinate with Leadpoint supervisors on what tasks the Leadpoint workers should generally perform, but lets the Leadpoint supervisor coordinate which individual Leadpoint workers will do what. (Tr. 86-87, 91.)

⁸ Mr. Stevens also claimed that a Leadpoint supervisor told him that BFI employees “Pablo” and “Chris” had asked for him to be a Maintenance Helper; however, he later admitted that he was not present for any such conversations. (Tr. 255-57.) Neither BFI employee is a supervisor and there is no evidence that either of them actually made such a request. (Tr. 290-92.)

Contrary to the Union's claim that BFI also "regularly" gives tasks to the Leadpoint workers, the record contains only a few limited examples of routine instructions:

- Sorter Andrew Mendez admitted that he has never seen a BFI supervisor give a Leadpoint worker any instructions, outside of one occasion when Mr. Ortiz handed him a broom and asked him to clean his area. (Tr. 269-70.)
- In her two to three years at the Recyclery, Sorter Marivel Mendoza admitted that she had seen a BFI supervisor give directions to clean or change lines only "a couple of times."⁹
- Screen Cleaner Travis Stevens claimed that Mr. Ortiz gave him tasks for only a short period of time when he was a Maintenance Helper for three or four days.¹⁰ (Tr. 241-43.)
- Mr. Keck once reminded Leadpoint workers that they must clean up after the lines stop, but stressed that cleaning did not cut into their break time, after he felt Leadpoint supervisors had not conveyed that information to them.¹¹ (Tr. 112, 273, 296-97.)
- Mr. Keck once asked Housekeeper Clarence Harlin to clean a fence line, which became part of the services he provides under the Agreement. (Tr. 215-18, 222-23.)

⁹ Ms. Mendoza also claimed that Equipment Operator David Martinez has honked a horn from the Control Room and gesture for the Sorters to clean or change lines "a couple of times." (Tr. 283-84.) As explained above, Mr. Martinez is not a supervisor for BFI and, in fact, is represented by the Union. (Tr. 117-18.) Mr. Martinez works in the Control Room with the Leadpoint supervisors, while Ms. Mendoza was in the sorting area and was not actually inside the Control Room to know whether Leadpoint supervisors had asked Mr. Martinez, who operates the horn, to give such directions. (Tr. 31-32, 282-85.)

¹⁰ While a Leadpoint maintenance worker may provide some general assistance to BFI mechanics in lifting or moving an item, the Union – who bears the burden of proof – presented absolutely no evidence regarding how regularly that occurred. (Tr. 33-34, 62.) At any rate, employees of one company asking employees of another company for brief assistance in lifting or moving an item cannot input joint employer status.

¹¹ Leadpoint workers have never complained to anyone at BFI or Leadpoint that the cleaning cuts into break time. (Tr. 277-78.)

- Mr. Harlin admitted that no BFI supervisor ever spoke with him about his tasks when he was a Sorter, outside of one time when he disagreed with Mr. Sutter about when to stop the line. (Tr. 223, 238.) According to Mr. Harlin, he and Mr. Sutter then went into the Control Room and each presented their side of the story to three Leadpoint supervisors. (Tr. 221-.) Mr. Sutter did not discipline Mr. Harlin in relation to that incident. (Tr. 230.) Indeed, he described it as the Leadpoint supervisors being the ultimate decision-makers on the issue: “They asked John what was his argument. And they told him. And then they asked me to talk. So I spoke. . . . He had his argument. I had my argument.” (Tr. 230, 238.) To that end, Mr. Harlin admitted that he continued what he was doing regardless of what Mr. Sutter said and that the Leadpoint supervisors never directed him to follow any directions from Mr. Sutter. (Tr. 230-31, 238.)

Outside of Mr. Stevens’ claim that he received instructions from Mr. Ortiz when he briefly worked as a maintenance helper for 3-4 days, the Union failed to advance any evidence of regular, daily instructions for any Leadpoint workers performing maintenance – which all of BFI’s supervisors denied. (Tr. 30, 66, 24, 66, 77, 113-14, 139, 191, 261-62.) Mr. Stevens’ further claim that non-supervisory BFI employees have asked him to clean different machines when he “occasionally” works Saturdays does nothing to support the joint employer argument – such employees are not BFI supervisors and one company’s employees asking another company’s employees for occasional assistance cannot impute joint employer status. (Tr. 249, 266-67.) To the contrary, Mr. Stevens admitted that BFI’s supervisors are not present at the facility on Saturday and that he receives his actual task list from Leadpoint supervisors. (Tr. 249, 266.)

Even more concerning is the Union’s claim that the Regional Director failed to consider evidence that Mr. Harlin receives directions from BFI directly “at least a couple of times a week” as a Housekeeper. What the Union conveniently fails to mention is that Mr. Harlin admitted that, while Mr. Sutter has asked him to clean under the 18-wheelers

once a week, he has never once complied with Mr. Sutter's request by his own choice and, further, has never received any discipline for not doing so – not typical behavior if he thought he was receiving instructions from a supervisor who could discipline him. (Tr. 229, 236-37.) Indeed, Mr. Harlin is not aware of any Leadpoint worker receiving discipline for failing to comply with a request from Mr. Sutter. (Tr. 236-37.) The Regional Director specifically addressed this testimony and found it notable that Mr. Harlin has always refused to clean under the trucks without any resulting discipline. (DDE, at 10.)

Such limited examples fail to establish that BFI gives the Leadpoint workers' daily instructions, nor do they contradict the BFI supervisors' testimony that they do not speak to the Leadpoint workers on a day-to-day basis. After reviewing all of this evidence, the Regional Director properly determined that BFI's instructions were "either routine or routinely ignored."¹² (DDE, at 17 n.11.) The Regional Director then went on to find that "Harlin further stated that he routinely ignored the order and never received discipline for his inaction. Accordingly, I cannot conclude that BFI instructed Leadpoint employees." (DDE, at 17-18 & n.11.) Contrary to the Union, the Regional Director did not simply credit the management witnesses while ignoring the Union witnesses. He expressly

¹² In regards to the Union's comments that BFI failed to recall management witnesses to rebut the Union witnesses' testimony, BFI's counsel objected numerous times to being required to present its evidence first when the Union had the burden of proof. Without knowing the Union's specific claims in regards to the joint employer issue when it first put on its case, BFI did not know what testimony from the Union's witnesses might need to be rebutted at that time. As BFI explained, it would be hard-pressed to recall management witnesses for rebuttal on the same day as its witnesses had either just finished a long shift and needed to sleep before the next overnight shift, or else needed to start their shift while the hearing was in progress.

considered the Union witnesses' testimony regarding the few examples of directions and simply found that such limited, routine or routinely ignored directions did not establish joint employer status. While the Union may not like the Regional Director's accurate assessment of this evidence, it cannot claim that the Regional Director never considered it when he expressly addressed it more than once in the DDE.

C. BFI Does Not Control The Leadpoint Workers' Wages.

Contrary to the Union's mischaracterizations, BFI does not control the Leadpoint workers' wages. As the Regional Director correctly found, Leadpoint retains the sole authority under the Agreement to set Leadpoint workers' wages and benefits. (DDE, at 15.) Indeed, Leadpoint alone determines individual Leadpoint workers' wages, issues their paychecks, including making all necessary payroll contributions and deductions, and maintains their payroll records and personnel files. (Tr. 25, 77-78, 99, 100, 139, 140.) The Union also fails to mention that Leadpoint provides its employees with benefits independent of BFI and requires job applicants to sign an acknowledgement that they are not BFI employees and are not eligible for BFI benefits. (Tr. 26, 80, 96, 140-41, 158-60, 167, 177; Jt. Ex. 1 at Ex. C.)

In arguing that BFI controls the wages for Leadpoint workers, the Union conveniently conflates the services rates in the Agreement with actual wages rates. However, there is a difference between setting individual pay rates and agreeing to service rates. BFI pays Leadpoint a bill rate mark up amount as a percentage of the wages that Leadpoint pays to its employees. (Jt. Ex. 1 at Ex. A.) Any time a customer engages the services of an independent contractor, it has the right to agree or not agree to

what amount it will pay for those services. That does not mean the customer controls the actual wages that the employer decides to provide its employees related to those services. If that were so, any one of us could be found to employ someone who repairs our car, does construction on our home or provides any other type of service. Such a finding cannot be countenanced. While the Union also claims that Leadpoint supervisors have told Leadpoint workers that raises are out of Leadpoint's control, it cites to testimony in which Mr. Ramirez expressly denied that he or any of his supervisors have said that and further denied that raises for Leadpoint workers depended on the contract rate with BFI. (Tr. 176.) In reality, Leadpoint alone determines the actual wage rates that it pays its employees. (Tr. 26, 80, 96, 141, 158-60.)

In an attempt to demonstrate that BFI controls individual Leadpoint workers' wages, the Union could point to only two situations, neither of which the full record evidence actually supports. First, the Union claims that a wage increase occurred "only after Leadpoint and BFI entered into an agreement to change the rate schedule." That assertion not only fails to comport with the record evidence, it actually reverses the cause-and-effect nature of that contract negotiation. In reality, Leadpoint was required to increase wages based on an increase in the San Jose minimum wage ordinance – a fact that the Union fails to admit in its Request for Review. (Tr. 60.) As a result, Leadpoint decided to negotiate with BFI to increase service fees for profit purposes. It is ridiculous to argue that, because BFI agreed to increase its service fees after the San Jose minimum wage ordinance change that BFI somehow controlled that wage rate increase – indeed, exactly the opposite occurred. While BFI contractually agreed to increase its service fee,

it was not obligated to do so and, as a matter of law, could not have affected the wage rates paid by Leadpoint. The law still required Leadpoint to meet the increased minimum wage requirement. Had BFI not agreed to increase its service fees at the same time, Leadpoint simply would have made less of a profit under the Agreement.

Second, the Union relies on the testimony of a single Union witness, Mr. Harlin, who claimed that BFI had first given him a raise and then taken it away. Contrary to the Union's assertions, the Regional Director did not ignore his testimony. Indeed, it is the Union who ignores the full record evidence: on cross-examination, Mr. Harlin admitted that he was not present for any conversations where he actually heard any BFI supervisor increase or reduce his pay rate and, further, admitted that, "Leadpoint gave me the raise." (Tr. 223-24, 231-233.) While Mr. Harlin claimed that Mr. Haas later told him that Mr. Keck decided to "take away" his raise, Mr. Haas testified he told Mr. Harlin that Leadpoint decreased his pay after he ceased being a line captain (a Leadpoint job title). (Tr. 224, 299-300.) As Mr. Harlin admitted, BFI had no involvement with changing his positions. (Tr. 239, 294-95, 299.) Rather, after Mr. Keck and Mr. Haas noticed an invoicing error relating to misclassifications after Mr. Harlin was no longer a line captain, Mr. Haas contacted Mr. Russo, who decided to correct Mr. Harlin's job classification, which changed the amount of pay that Leadpoint chose to give him; BFI had no involvement in that decision.¹³ (Tr. 292-93, 296, 299.) Regardless of the service rates paid by BFI, Leadpoint could have continued paying him a different wage rate,

¹³ Contrary to yet another attempt to conflate different concepts, BFI does not regularly (or ever) review Leadpoint's "wage rates" – it simply reviews its contract invoice rates as any customer would do.

established by the fact that HR made an independent decision on changing Mr. Harlin's wage rate. Accordingly, the Acting Regional Director properly found that BFI does not control the Leadpoint workers' wages.

D. BFI Does Not Control The Hiring Criteria For The Leadpoint Workers.

While the Union claims that BFI controls the "hiring criteria" for Leadpoint workers, that simply is not true. The Agreement does require Leadpoint to drug test its workers prior to assignment to the Recyclery; however, BFI has no involvement in the drug testing or in any of Leadpoint's hiring processes. (Tr. 18-20, 63, 73-74, 93-94, 126-27, 160-61.) As the undisputed evidence showed, Leadpoint is solely responsible for the recruitment, screening, testing, and hiring process for its new employees, which it conducts through a Leadpoint trailer staffed solely by Leadpoint's HR Generalist, Anthony Chavez, and a Leadpoint administrative assistant. (Tr. 158-59, 200.) Leadpoint alone tests applicants' skills against Leadpoint's "top rating" requirements of 45 picks per minute, hand-eye coordination and other physical requirements, without any involvement or input from BFI. (Tr. 177, 200-01.) Leadpoint makes all of its own hiring decisions and does not even inform BFI when it hires a new person to work at the Recyclery; nor has BFI ever refused a Leadpoint worker assignment. (Tr. 19, 28, 63, 74, 77-78, 94-95, 100, 126-27, 202.)

E. BFI Does Not Regularly Train The Leadpoint Workers.

The Union also claims that BFI trains the Leadpoint workers, which is not supported by the evidence. As Leadpoint supervisors' undisputed testimony established,

Leadpoint is solely responsible for training its employees on medical evaluations, safety orientation and other Leadpoint employment policies, as well as how to provide the services required under the Agreement. (Tr. 22, 74, 95-96, 161-62.) During orientation, Leadpoint also explains its dress code, which BFI had no input into drafting. (Tr. 162-63.) BFI does not supply any uniforms, Personal Protective Equipment (“PPE”) or identification badges to the Leadpoint workers and Leadpoint workers do not wear anything with a BFI-related logo on it.¹⁴ (Tr. 21, 27.) Rather, per the terms of the Agreement, Leadpoint supplies all PPE to the Leadpoint workers, including safety vests and hard hats bearing the Leadpoint logo. (Tr. 21-22, 162-63.)

The Union misstates the evidence by claiming that BFI trained Leadpoint workers on new equipment in 2012. As Mr. Sutter clearly explained, they trained only Leadpoint supervisors on the new equipment, as BFI had the industry-specific knowledge necessary to train those supervisors so that they could adequately train and supervise their workers. (Tr. 102 (“Well, the leads would direct the workers, and they got their information – the leads got their information from management.”).) It is ridiculous to argue that a customer cannot initially explain to its service provider how to use its industry-specific equipment so that they can provide services properly. Importantly, Leadpoint has always had sole responsibility for training its workers on how to perform services at the Recyclery. (Tr.

¹⁴ While Leadpoint workers did volunteer to wear BFI PPE during a short, two-day video and photo shoot last year, BFI did not “issue” any PPE to Leadpoint workers to perform their contractual services and Leadpoint workers did not keep the PPE once the two-day filming session was over. (Tr. 50-51, 68-69.) That is no different than BFI supplying such PPE to third-party actors for the filming and has nothing to do with the Leadpoint workers’ terms and conditions of employment.

121.) BFI does not provide any formal training to Leadpoint workers, nor do Leadpoint workers attend any employee orientation or formal employee meetings with BFI employees. (Tr. 22, 74, 95-96.) Rather, when Leadpoint assigns new Leadpoint workers to the BFI contract, Leadpoint supervisors provide the on-site training. (Tr. 96.) To that end, Leadpoint has developed a standard of work to use with the Leadpoint workers at the Recyclery, which incorporates the information presented during Leadpoint's employee orientation. (Tr. 171-73; LP Ex. 1.)

Nor does BFI train Leadpoint workers on a "daily basis," as the Union claims. As the customer, BFI has the right to ensure it receives the contracted-for services. If a BFI supervisor has an issue with service quality, he typically refers it to Leadpoint management and lets them decide how they want to deal with it. (Tr. 82, 89, 98-99, 116-17, 128-29.) As Mr. Sutter explained, Leadpoint supervisors "know how to handle" problems without any instructions from BFI. (Tr. 98-99, 115-16.) While BFI management has on occasion pointed out what materials to take off the lines or suggested minimizing stopping the line, the record has only a few anecdotal examples over the four years that Leadpoint has provided services to BFI:

- One occasion when Mr. Ortiz and Mr. Keck addressed the general quality expectations for the sorting services provided under the Agreement in terms of what items to take off the lines with both Leadpoint workers and supervisors present.¹⁵ (Tr. 83-84, 245-48, 257-59.) They did not individually counsel or

¹⁵ While Mr. Stevens also claimed that Mr. Keck made a comment at one point about not "employing" them if they didn't make the quota for his budget, Mr. Stevens' recounting of that conversation varied drastically and he tried to paraphrase rather than repeat Mr. Keck's specific words. (Tr. 259-60, 262-65.) Mr. Keck, on the other hand, testified that he explained the processing they needed to cover the labor expense – he never told them he could not "employ" them if they did not meet production requirements. (Tr. 290.)

discipline any Leadpoint worker in relation to that informational meeting. (Tr. 89, 245-48, 257-59.)

- One occasion when Mr. Ortiz walked the Sorters around the plant to show them the items they had missed because BFI's customer was rejecting the product due to those items. (Tr. 245-48.) Mr. Ortiz did not individually counsel or discipline any Leadpoint worker in relation to that walk-around. (Tr. 259.)
- Five or six occasions when Mr. Keck held educational meetings with a handful of Leadpoint workers to discuss what to pull off of the wet line because BFI was starting to process wet material in a new way for the recyclery industry. (Tr. 136-39, 146.) Mr. Keck did not individually counsel or discipline any Leadpoint worker in relation to those educational meetings. (Tr. 118.)
- One occasion when Mr. Ortiz and Mr. Keck briefly explained the facility's emergency evacuation procedures to Leadpoint supervisors and workers – information specific to the facility which Leadpoint would have no way of knowing. (Tr. 84-85, 135-36.) No BFI employees were present at this meeting and it was simply a “reader's digest” version of the longer training given to BFI employees. (Tr. 135-36.)
- While Mr. Stevens (who had only worked as a Sorter for a couple of months at the time of the hearing) claimed that Mr. Ortiz has told him what to take off the line or not to push the stop button “multiple times,” and Ms. Mendoza claimed that Mr. Sutter “sometimes” told her how much plastic to remove, they provided no specific dates or further approximation. (Tr. 224-25, 282.) Interestingly, their testimony was refuted by the Union's two other witnesses: Mr. Mendez admitted that he has never seen a BFI supervisor give a Leadpoint worker any instructions (other than one occasion when Mr. Ortiz asked him to clean his area) and Mr. Harlin admitted that no BFI supervisor has spoken with him about his sorting tasks (outside of one time when he disagreed with Mr. Sutter about when to stop the line, presented the issue to Leadpoint management and ultimately decided to ignore Mr. Sutter). (Tr. 221-23, 230-31, 238, 269-70.)¹⁶

Such isolated instances of routine instructions to ensure BFI receives its contracted-for services cannot, as a matter of law, establish that BFI materially affects the terms of conditions of employment for Leadpoint workers, especially given BFI's lack of hiring,

¹⁶ There is no evidence that BFI has provided any training to Leadpoint's Screen Cleaners or Housekeepers, outside of Mr. Stevens' claim that two non-supervisory BFI employees showed him how to fix machines while he was a Maintenance Helper for three or four days. (Tr. 241-43.)

firing and disciplinary authority. The Union's attempt to transform those few examples of instructions into training on a "daily basis" is simply not credible. Indeed, the fact that Mr. Harlin felt free to ignore Mr. Sutter in regards to stopping the line – for which he admits he received no discipline – shows that even the Leadpoint workers do not view BFI as their employer.

F. BFI Does Not Enforce Its Employment Workplace Rules Against The Leadpoint Workers.

Nor does BFI generally enforce its workplace rules against Leadpoint workers. For example, BFI's employee manual and policies do not apply to Leadpoint workers. (Tr. 20-21.) Rather, Leadpoint has its own set of employment policies governing the Leadpoint workers, which BFI had no involvement in creating. (Tr. 69.) While the Union now claims that BFI has "work rules" regarding using the emergency stops on the sorting lines and cleaning their work areas, the emergency stops are simply part of the equipment used by Leadpoint workers in performing their services and it is reasonable for customers to expect that a contractor will leave their facility in a clean manner – those are not workplace rules governing an employment relationship.

Furthermore, the Union's own witness, Mr. Harlin, unequivocally refuted the theory that BFI has "enforced" a "work rule" about the emergency stops by explaining that, when he disagreed with Mr. Sutter about when to stop the line, he and Mr. Sutter went into the Control Room and each presented their side of the story to three Leadpoint supervisors. (Tr. 221-23, 238.) Mr. Sutter did not discipline Mr. Harlin in relation to that incident. (Tr. 230.) Indeed, he described it as the Leadpoint supervisors being the

ultimate decision-makers on the issue: “They asked John what was his argument. And they told him. And then they asked me to talk. So I spoke. . . . He had his argument. I had my argument.” (Tr. 230, 238.) To that end, Mr. Harlin admitted that he ignored Mr. Sutter’s viewpoint. (Tr. 230-31, 238.) Leadpoint supervisors never directed him to follow any directions from Mr. Sutter and he never received any resulting disciplinary action. (Tr. 230-31, 238.)

While the Agreement allows BFI to train Leadpoint workers on safety issues, in actuality, Leadpoint created all of its safety requirements, including a safety manual and employment policies and procedures, which apply to approximately 1,000 Leadpoint employees across the United States. (Tr. 156, 179-80, 214-15.) BFI has no input or involvement with Leadpoint’s safety requirements or employment policies and procedures, nor do Leadpoint workers attend BFI’s safety training. (Tr. 69.) While BFI communicates general safety requirements for job site safety to be in compliance with legal requirements (and Leadpoint certainly expects BFI to ensure the safety of everyone on site), BFI has not even seen Leadpoint’s current safety policies. (Tr. 70, 179-80.) The fact that BFI sets certain safety standards for its facility does not mean that it “enforces” employment policies against Leadpoint workers through any type of discipline. Rather, BFI must ensure certain safety standards are met because it is liable for what happens on its property – regardless of whether the individual is a BFI employee, a contract worker, a customer or anyone else.

To that end, when Mr. Keck observed two Leadpoint employees with a container of whiskey at the Recyclery, he simply brought it to Leadpoint’s attention. (Tr. 13-31,

130-31, 202-03.) Leadpoint then independently investigated the situation, including sending its workers for blood-alcohol testing, before making its own disciplinary decisions. (Tr. 203-05.) While Mr. Keck requested that the workers not return to the Recyclery, he admitted that he has no idea whether they are still there. (Tr. 58, 131-35; U. Ex. 2.) Nor did he request any type of disciplinary action against them. (Tr. 131-34.) As explained below, Leadpoint made two very different disciplinary decisions in regards to those two workers without any involvement or input from BFI. (Tr. 169-70, 185.)

G. BFI Has No Involvement With Discipline For The Leadpoint Workers.

In regards to both the whiskey incident and another incident involving a Leadpoint worker intentionally destroying Company property (which was caught on videotape), the Regional Director properly found that BFI had no involvement in any disciplinary actions involving those workers. (DDE, at 16-17; Tr. 197-99.) Contrary to the Union's argument, BFI does not use the videotape for disciplinary purposes – rather, Mr. Keck simply noticed the property destruction on the videotape and brought it to Mr. Haas' attention, who conducted his own independent investigation without any involvement from BFI. (Tr. 197-200; U. Ex. 2.) As the DDE makes clear, BFI does not have any authority to discipline or discharge Leadpoint workers. (DDE, at 16.) Rather, Mr. Keck simply made a "request" that they not return to the Recyclery due to safety and property concerns and stated that he "hoped" Leadpoint agreed. (DDE, at 16-17; U. Ex. 2.) Similarly, while the Union claims that Mr. Keck testified that he believed Mr. Mennie "reserved the right to dismiss unit employees," what Mr. Keck actually said was that he believed Mr. Mennie had the ability to "ask" Leadpoint to remove a Leadpoint worker,

consistent with the Regional Director's determination that BFI can only request a Leadpoint worker be removed from the Recyclery assignment without any authority to actually remove Leadpoint workers itself. (Tr. 157; DDE, at 16.)

Mr. Keck further testified that he had no involvement with any resulting discipline and did not know whether Leadpoint had actually removed any of those workers from the BFI assignment. (Tr. 131-34, 144-45, 200.) In reality, after Leadpoint conducted its independent investigations, it discharged two of those workers and simply reassigned the third worker to another contract – decisions which it did not communicate to BFI. (Tr. 58, 133-35, 144-45, 169-70, 185, 198-200, 203-05.)

H. BFI Does Not Schedule The Individual Leadpoint Workers.

While the Union claims that BFI sets the Sorters' shifts, break times and overtime by determining how long the lines will run, the Regional Director found that claim was "not entirely accurate." (DDE, at 19.) While BFI controls when the lines run and for how long based on the amount of product coming into the Recyclery, that is simply a matter of the customer setting out the parameters of when it needs services provided – Leadpoint alone schedules the Leadpoint workers, deciding who will work which shift and who will stay for overtime. (Tr. 85-86, 100-01, 119, 191.) To that point, Leadpoint supervisors – not BFI supervisors – instruct the Sorters that they are expected to stay on their lines when they are running. (Tr. 276, 280.) Leadpoint supervisors must also review the Leadpoint workers' sign-in sheets and call in back-up workers as needed. (LP Ex. 2A.)

Furthermore, the Union – which bears the burden of proof – presented no evidence that BFI sets even general shift times for the Screen Cleaners or Housekeepers. To the contrary, as Mr. Stevens admitted, BFI supervisors are not involved with scheduling any individual Leadpoint worker. (Tr. 24, 66, 77, 113, 139, 191, 261-62.) For example, BFI does not decide which Saturdays the non-Sorters will work or at what time. (Tr. 113-14.)

Nor was there any evidence that BFI is responsible for deciding if a particular Leadpoint worker can take a break – while all Leadpoint Sorters can take a break when their line stops running, Leadpoint retains sole discretion to grant or deny breaks to their workers while the lines are running and also gives their workers a 5-minute warning before their breaks end. (Tr. 24, 77-78, 221.) The Union presented no evidence regarding breaks for the Housekeepers or Screen Cleaners.

While the Union also claims that BFI sets the number of employees per line and that Leadpoint “cannot” change that number, the record evidence actually shows that BFI only sets headcount targets, which Leadpoint may or may not meet. (Tr. 106.) Indeed, on the day of the hearing, Leadpoint was under the target headcount by three workers. (Tr. 106.) There is no evidence that Leadpoint is prohibited from increasing workers above the target headcount; rather, Mr. Mennie only said that “it’s not come up” to his knowledge. (Tr. 36.) Nor does the Union cite to any evidence to support its claim that Leadpoint cannot increase the number of employees per line. To the contrary, Mr. Sutter testified without contradiction that “Leadpoint will put another man on that line.” (Tr. 110 (emphasis added).) Importantly, BFI has no control over deciding which particular worker works a particular line. (Tr. 36-37, 63, 77, 88, 96, 119.)

Further, while BFI may direct the lines to run beyond the designated shift time based on the amount of volume coming into the facility, it does not decide which Leadpoint worker will work on which line or tell Leadpoint which workers to keep on the lines to work overtime. (Tr. 24, 36-37, 63, 77, 88, 96, 119.) Contrary to the Union's claim that the Regional Director merely speculated that Leadpoint decides which workers will stay for overtime, all of the supervisors testified that BFI has no involvement in deciding which particular Leadpoint workers will stay for overtime. (Tr. 37 ("BFI determines how long we're going to run the equipment. Leadpoint would determine who stays around if we're going to run overtime."); *accord* Tr. 24, 77, 88, 96, 139.) As Mr. Sutter explained, BFI supervisors simply inform the Leadpoint supervisors how long the lines will run, typically during the last shift break. It is still Leadpoint's decision on which particular Leadpoint workers remain for overtime:

Most of the time, it's on the radio; like, 98 percent of the time, it's on the radio. Either way, the leads are told what time we're going to run until, so they have an hour to manipulate whatever people they need to move to whatever line is going to run, and who's going to go home; that's all their decisions.

(Tr. 107-08.) As Mr. Harlin and Mr. Mendez both admitted, they receive instructions regarding overtime from their Leadpoint supervisors, not from BFI. (Tr. 227, 276.) Similarly, as Mr. Mendez admitted, BFI supervisors do not tell Leadpoint workers when they can leave for the day. (Tr. 276-77.) Mr. Keck, who is responsible for reviewing Leadpoint's invoices in order to manage expenses, does not even have enough familiarity with any given Leadpoint worker to know whether their reported overtime hours are correct. (Tr. 55, 153-54.)

The Union also claims that, because BFI controls when the lines start running, it dictates whether the Leadpoint workers have sufficient time to stretch. This also is not correct. To the contrary, Ms. Mendoza admitted the lines start at the same time every day and that only the Leadpoint supervisors – not BFI supervisors – instruct them on stretching. (Tr. 286.) Indeed, it is Leadpoint’s daily Standard of Work that requires the Leadpoint supervisors to make sure their workers stretch, which is a Leadpoint – not a BFI – requirement. (Tr. 193-97, 288; LP Ex. 2(a).) Indeed, Mr. Keck was not even aware that Leadpoint workers performed stretches at the Recyclery. (Tr. 288.)

While the Union claims that BFI “controls the holidays” for the petitioned-for unit, that again misstates testimony. As Mr. Ramirez testified, Leadpoint sets its own holidays, which apply across the United States, and does not even know when BFI is closed for holidays. (Tr. 177.) Leadpoint alone grants or denies time off requests for its workers, which would include a time off request for a holiday when the Recyclery is open. (Tr. 77, 213-14.) While Leadpoint cannot control when BFI closes its facility for holidays, it can always set employee holidays and send other workers to work at the BFI location on non-BFI holidays or provide holiday pay to its employees regardless of BFI’s schedule. Indeed, the same is true for any service customer contract – otherwise, a construction contractor could decide to show up at a residential home in the middle of the night, on the weekend or on a holiday.

BFI is not responsible for deciding if a particular Leadpoint worker can leave early or come in late. (Tr. 24, 77-78.) Rather, if a Leadpoint worker is going to be late or absent, they notify a Leadpoint supervisor on the supervisor’s Leadpoint-provided phone.

(Tr. 28, 78, 99, 213.) When Leadpoint workers need to request time off, they fill out a Leadpoint-created PTO form and submit it in the Leadpoint trailer. (Tr. 213-14.) Leadpoint alone is responsible for granting or denying leave and time off requests from its employees – BFI supervisors have no responsibility for approving or denying leave time, time off or any other scheduling requests from Leadpoint workers. (Tr. 77.) Not surprisingly, Leadpoint workers do not bring scheduling issues to BFI management. (Tr. 79, 98.)

Accordingly, as the Regional Director recognized, while BFI sets the general shift times and hours, “I find that authority alone to be insufficient to warrant a finding BFI actually control[s] Leadpoint employees’ schedules given Leadpoint’s sole control of all other aspects of its employees’ schedule within that limited parameter.” (DDE, at 18.)

I. BFI Does Not Set Productivity Standards For The Leadpoint Workers.

The Union errs in claiming that the Regional Director found BFI maintains productivity standards for the individual Leadpoint workers. To the contrary, the DDE states that, while BFI will adjust the speed of the line based on the amount of incoming material, “BFI neither controls nor enforces the speed at which the individual Leadpoint employees work in response to these speed changes on the streamline.” (DDE, at 9.) That finding accurately reflects with the record evidence. As Mr. Sutter testified, “[w]e have productivity standards, not so much for individual lines like you’re suggesting, more for the plant, more for the tonnage, for overall, more for percentage of up-run time. I get that a lot. I don’t get this line has to have X number of – so it doesn’t really go by the lines.” (Tr. 109.)

While the Union claims that BFI controls the speed at which Leadpoint workers sort by controlling the speed of the lines, it cites to only the beginning page of Mr. Sutter's testimony on that subject, while an actual reading of his full testimony refutes the Union's claim:

Q: Do you set the line speeds when you're on shift?

A: I've heard you ask that question before, and I'm not really sure what you're talking about. You say line speed. There are two types of speed; there's the hand speed of the workers, and then there's the speed of the belt, and I honestly don't know which one you're talking about.

Q: Well, let's talk about the speed of the belt.

A: Yes. I control the speed.

Q: Are you involved with that? And is that based on any particular factors? How do you determine the speed of the belt?

A: It will be based on the flow of material.

Q: Okay. You also said there's another speed that –

A: Well, the hand speed of the workers themselves.

Q: Uh-huh.

A: **I have nothing to do with that. That's all Leadpoint criteria.**

Q: Okay. So you don't set out any criteria for the Leadpoint workers in terms of hand speed.

A: Huh-uh.

(Tr. 100-01 (emphasis added).)

In reality, the only productivity standards assessed against Leadpoint workers are Leadpoint's own "top rating" and physical tests, which BFI had no involvement in creating or implementing. (Tr. 200-01.) Nor does BFI otherwise set productivity standards for the Leadpoint workers or expect them to keep up with the line speed, as adjustments can be made or a Leadpoint supervisor may decide to put another worker on the line. (Tr. 109-11, 118.) Rather, as part of the Leadpoint supervisors' daily duties, they must assess and document each Sorter's hand speeds and material picks **at least 3 times per day**. (LP Ex. 2A.)

Accordingly, the Regional Director appropriately determined that “BFI’s mere ability to change the speed of the material stream, which is based on the quantity of the material alone, does not create a level of control that is sufficiently direct or immediate to warrant a finding of joint control. As such, I find that BFI’s control of the speed of the material stream is routine in nature and is not based on individual assessments of Leadpoint’s employees or evidence of control in the manner in which the Leadpoint employees perform their work.” (DDE 17 (internal citation omitted).)

IV. The Acting Regional Director Appropriately Applied Existing Board Precedent.

To establish a joint employer relationship, the separate entities involved must be shown to “share or co-determine” the essential employment conditions of the employee group. *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3d Cir. 1982). Accordingly, the evidence must demonstrate that the co-determination “meaningfully affects matters related to the employment relationship, such as hiring, firing, discipline, supervision and direction.” *TLI, Inc.*, 271 NLRB 798 (1984), *enfd. mem.* 772 F.2d 894 (3d Cir. 1985) (emphasis added; internal citation omitted).

The Board makes this determination based on the totality of the circumstances. Thus, the alleged joint employer must not only have the right under contract to control the labor relations policies of the acknowledged employer, but must actually exercise such control. *TLI, Inc.*, 271 NLRB at 798-99; *Cabot Corp.*, 223 NLRB 1388 (1976), *enfd.*, 561 F.2d 253 (D.C. Cir. 1977); *AM Property Holding Corp.*, 350 NLRB 998, 1000 (2007), *modified on other grounds*, 352 NLRB No. 44 (2008) (“In assessing whether a

joint employer relationship exists, the Board does not rely merely on the existence of such contractual provisions, but rather looks to the actual practice of the parties.”).

Here, the totality of the circumstances demonstrates that BFI and Leadpoint are wholly separate entities, which do not share or co-determine the terms and conditions of employment for any of the Leadpoint workers at issue. Both pursuant to the Temporary Labor Services Agreement and in practice, BFI has no involvement with hiring, training, paying, providing benefits to, scheduling, adjusting grievances for, supervising, directing, disciplining or firing any Leadpoint workers. Because the record is void of any evidence demonstrating that BFI somehow controls the terms and conditions of employment for any Leadpoint workers (not to mention the requisite meaningful control), BFI is not a joint employer with Leadpoint.

While the Union claims that the Regional Director did not following existing Board precedent, that claim does not bear out in light of the record evidence detailed above. First, as explained fully above, BFI does not “closely and routinely” supervise the Leadpoint workers; indeed, BFI supervisors spend the vast majority of their time in areas away from the Leadpoint workers. Outside of a handful of occasions when a BFI supervisor has asked a Leadpoint worker to do something or explained when to press the stop button or what to pull off the lines (directions which Leadpoint workers do not always follow), there is no evidence of interactions between BFI supervisors and the Leadpoint workers. Nor is there any evidence that BFI supervisors constantly (or even regularly) observe the Leadpoint workers. Rather, the supervision and direction of the Leadpoint workers is the sole responsibility of Leadpoint’s large staff of on-site

supervisors, who must assign tasks and positions, observe their employees' work and monitor productivity standards as set by Leadpoint – not BFI – on a daily basis, including monitoring the Sorters' hand speeds at least three times per shift. The Board has made it very clear that supervision that is limited and routine in nature does not support a joint employer finding. *See, e.g., G. Wes Ltd. Co.*, 309 NLRB 225, 226 (1992) (instructing workers where to work and with whom insufficient); *S. Cal. Gas Co.*, 302 NLRB 446, 461-62 (1991) (daily orders and requests for the specific contractual services to be performed insufficient); *Thums Long Beach Co.*, 295 NLRB 101 (1989) (informing workers of maintenance needs to ensure compliance with contractual duties under the staffing agreement insufficient); *TLI, Inc.*, 271 NLRB at 798-99 (limited and routine nature of directing workers what deliveries to make each day insufficient).

Based on the record evidence, the cases relied on by Union (some of which pre-date the Board's decision in *TLI, Inc.* adopting the 3rd Circuit's joint employer relationship analysis) are distinguishable as they involved close supervision combined with control over terms and conditions of employment – which does not exist here. *See, e.g., Quantum Res. Corp.*, 305 NLRB 759, 760 (1991) (company exerted "substantial supervisory authority" by a "high degree of detailed awareness and control of unit employees' daily activities," approved timesheets, compensation and changes in job duties or titles, and co-determined hours, holidays and benefits); *Heileman Brewing Co.*, 290 NLRB 991, 999-1000 (1998) (company sub-contracted work, but agreed the employees would be retained by the subcontractor and bargained with the union over their terms and conditions of employment, "only the Company exercised meaningful

supervision over the day-to-day work of the employees,” the company initiated disciplinary action and determined what action was warranted, and the company resolved grievances with the union and granted company benefits).

Rather, the Regional Director properly followed the analogous decision in *TLI, Inc.* (noting that, while the alleged joint employer exercised “some control” over the workers at issue by giving them daily work instructions, “it did not affect the terms and conditions of employment to such a degree that it may be deemed a joint employer” given “its lack of hiring, firing and disciplinary authority,” 271 NLRB at 798-99 (emphasis added)); *see also Laerco Transp. & Warehouse*, 269 NLRB 324 (1984) (finding no joint employer status, even though the company had the only supervisors on site and gave daily routine instructions on what to do and work priorities, expected the assigned workers to meet its needs, rejected an assigned driver who did not meet Laerco’s qualifications and attempted to resolve minor problems or dissatisfactions that arose involving the workers).

In light of the fact that the control exercised in *Laerco* and *TLI, Inc.* far exceeds BFI’s day-to-day involvement with the Leadpoint workers at issue, it is inconceivable how BFI could be found to be a joint employer with Leadpoint. Indeed, contrary to *Laerco*, BFI does not reject Leadpoint workers, supervise Leadpoint workers on a day-to-day basis, or attempt to resolve HR problems or issues involving any of the Leadpoint workers. Nor does BFI typically direct the manner in which Leadpoint workers perform the contracted-for services. Rather, Leadpoint sets its own productivity standards for the

individual workers and counsels them, including the possibility of discipline, in regards to their work performance.

Admittedly, BFI management does discuss certain operational needs with Leadpoint management, including how fast the lines will run, how long the lines will run and what tasks need to be accomplished. However, those routine directions to Leadpoint supervisors are more indicative of a customer simply detailing the services needed, not evidence that BFI and Leadpoint “share or co-determine” the terms and conditions of employment for the Leadpoint workers at issue. Stated differently, BFI management tells Leadpoint management what needs to get done and, then, Leadpoint management chooses how to get the job done. This type of oversight is not only commonplace, but expected, when a company uses an independent contractor to complete certain tasks at its facility. As well-explained in *Southern California Gas Co.*:

An employer receiving contracted labor services will of necessity exercise sufficient control over the operations of the contractor at its facility so that it will be in a position to take action to prevent disruption of its own operations or to see that it is obtaining the services it contracted for. It follows that the existence of such control, is not in and of itself, sufficient justification for finding that the customer-employer is a joint employer of its contractor’s employees.

302 NLRB at 461-62 (finding no joint employer relationship, even though the company provided a chart showing which specific tasks to perform and how often and required the subcontractor to supply the adequate number of trained workers). Relying on that language, the Board in *Airborne Freight Co.* adopted the ALJ’s finding that prompting drivers to get out on the road early to meet their contractual requirements with customers did not establish a joint employer status. 338 NLRB 597, 597, 612 (2002) (adopting

ALJ's finding of no joint employer status). Here, BFI similarly has the right to ensure it receives its contracted-for services, including explaining to the Leadpoint workers what items should be pulled off the line after BFI's customer rejected the end product, without creating a joint employer relationship.

While the Union also claims that BFI is a joint employer because it sets the target headcount, as the Regional Director correctly noted, "the Board has previously held that the authority to mandate staffing requirements in a contract with a subcontractor is insufficient by itself to support a finding of joint employer status." (DDE, at 18 (citing *S. Cal. Gas. Co.*, 302 NLRB at 461-62).) Nor does BFI set wage rates for the Leadpoint workers. While BFI has contracted for a set bill rate amount based on wages and the Agreement requires Leadpoint's agreement before Leadpoint can pay Sorters a wage rate in excess of the wage rate that any BFI employee may earn for similar duties, Leadpoint alone sets its workers' actual wage rates. Merely retaining the right to set the amount of pass-through costs that BFI will agree to is not a basis for finding joint employer status. *See Hychem Constructors, Inc.*, 169 NLRB 274, 275-76 (1968) (company's right to "police reimbursable expenses under its cost-plus contract," including approving raises and overtime, insufficient to establish joint employer status).

While the Union also claims that BFI is involved in disciplinary actions for Leadpoint workers, case law says otherwise. As the Regional Director noted, BFI has brought one safety issue and one intentional property damage issue to Leadpoint's attention and requested that those workers be removed from the BFI assignment. However, contrary to the case law relied on by the Union, BFI did not "prompt" the

discharge or discipline of any Leadpoint worker. *See, e.g., Boire v. Greyhound Corp.*, 376 U.S. 473, 475 (noting the Board relied on the fact that the company had prompted the discharge of the other employer's employee in finding a joint employer relationship). Rather, Leadpoint conducted independent investigations and made its own disciplinary decisions – varying from discharge to reassignment without any formal discipline. As the Regional Director pointed out, Mr. Keck simply requested that Leadpoint remove the workers – he did not demand it. Indeed, Mr. Keck had no idea at the time of the hearing whether Leadpoint had actually removed those workers.

At any rate, as the Regional Director noted, “it is well established that the enforcement of rules to insure safety and security is the natural outflow of the right of any property owner to protect their premises and does not indicate the authority to terminate or discipline the employees of a subcontractor.” (DDE, at 17); *accord Airborne Freight Co.* 338 NLRB at 612 (adopting ALJ's findings in which he noted that threatening to bar a worker after he walked on a moving conveyer belt did not amount to involvement in discipline as a company “should be able, without being found to be a joint employer, to exercise some power over a contractor when the contractor's employees engage in activity which may result in injury and impose legal liability on Airborne for accidents that occur on its premises”); *TLI, Inc.*, 271 NLRB at 798-99 (finding company was not a joint employer when it simply reported workers' conduct adverse to its operations to the staffing agency, which would independently conduct an investigation and determine whether disciplinary action was warranted); *Hychem Constrs.*, 169 NLRB 274, 276 (1968) (no joint employer relationship, even though company required workers to comply

with safety rules and had the prerogative to remove undesirable workers because “the promulgation of such rules, which seek to ensure safety and security, is a natural concomitant of the right of any property owner or occupant to protect his premises”). In comparison, there is no evidence that BFI ever requested that Leadpoint remove a worker from assignment for performance problems or any other reason.

V. There Is No Compelling Reason To Overturn Existing Board Precedent.

There is simply no reason to reverse almost thirty years of Board law regarding joint employer status, especially on the facts here as fully explained above. As the Board explained in rejecting then-Member Liebman’s suggestion to re-visit the current standard for determining joint employer status:

Simply put, the Board’s test for determining whether two separate entities should be considered to be joint employers with respect to a specific group of employees has been a matter of settled law for approximately twenty years. In determining whether a joint employer relationship exists under this test, the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment. The essential element in this analysis is whether a putative joint employer’s control over employment matters is direct and immediate. Thus, approximately 20 years ago, the Board, with court approval, abandoned its previous test in this area, which had focused on a putative joint employer’s *indirect* control over matters relating to the employment relationship. We would not disturb settled law.

Airborne Freight Co., 338 NLRB at 597 n.1 (adopting ALJ’s finding of no joint employer status) (internal citations omitted). The Board has not re-visited the joint employer standard following that decision, which has remained the applicable Board precedent for approximately thirty years.

Nor is there any reason to re-visit the standard now. BFI does not control terms and conditions of employment for the Leadpoint workers, from hiring to wages and benefits to time records to employment policies to discipline or discharge. As explained above, BFI does not “constantly” observe or direct the Leadpoint workers. To the contrary, BFI supervisors spend the vast majority of their day (70%-100%) in areas away from the Leadpoint workers. BFI has not imposed any new work rules or assignments on the Leadpoint workers. As Mr. Harlin, the Union’s own witness made clear, Leadpoint workers can actually refuse to respond to BFI’s requests to perform additional work duties or follow suggestions without any resulting disciplinary action.

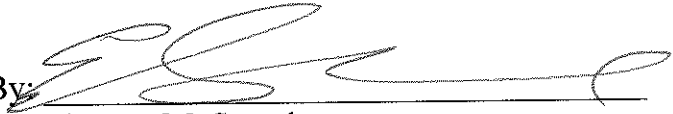
Regardless of BFI’s service requirements and control over its own operations, Leadpoint and the Union would still be able to meaningfully bargain over the Leadpoint workers’ terms and conditions of employment, which BFI does not directly or indirectly control. For example, while BFI sets the general shift times and controls how long the lines run based on the product coming into the facility, Leadpoint and the Union could still agree that the Leadpoint workers would work no more than eight hours per day, which would simply require Leadpoint to schedule its employees differently to meet the servicing requirements. As another example, if the Union and Leadpoint agreed that the Leadpoint workers would receive at least two hours of overtime pay per week, Leadpoint could still provide overtime pay to its workers, even if a worker did not work overtime in a given week.

BFI is simply a customer who has contracted for sorting and related services to be provided at its facility. It has no authority over the Leadpoint workers in terms of hire,

discipline or discharge and does not control wages, benefits or other terms and conditions of employment. BFI supervisors work in other areas than the Leadpoint workers for the vast majority of their day (70%-100%) and do not regularly converse with – let alone observe or direct – the Leadpoint workers in their day-to-day activities. Rather, Leadpoint's much larger staff of approximately fourteen supervisors is solely responsible for training, directing, assessing and disciplining their Leadpoint worker at the Recyclery. Accordingly, there is no reason to revise longstanding Board precedent clearly establishing that BFI is not a joint employer.

Dated this 10th day of September, 2013.

Respectfully submitted,

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ORIGINAL e-filed
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